

6-1-2006

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Rebecca S. Smith

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Recommended Citation

Rebecca S. Smith, *O'Hagan Revisited: Should a Fiduciary Duty Be Required Under the Misappropriation Theory?*, 22 GA. ST. U. L. REV. (2006).

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O'HAGAN REVISITED: SHOULD A FIDUCIARY DUTY BE REQUIRED UNDER THE MISAPPROPRIATION THEORY?

INTRODUCTION

Although insider trading has been in the forefront of the news for the past decade, the Securities Exchange Act of 1934 fails to expressly prohibit insider trading, with the exception of section 16(b), which is not an antifraud measure.¹ But since the 1961 administrative proceeding by the Securities and Exchange Commission (SEC), courts have continuously interpreted the Securities Exchange Act to allow enforcement against insider trading based on its provisions.² Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 have become the most important weapons against insider trading.³ Rule 10b-5 states:

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit

1. See 15 U.S.C. § 78p(b) (2005); Randall W. Quinn, *The Misappropriation Theory of Insider Trading in the Supreme Court: A (Brief) Response to the (Many) Critics of United States v. O'Hagan*, 8 FORDHAM J. CORP. & FIN. L. 865, 868 (2003).

2. Michael A. Snyder, *United States v. O'Hagan, The Supreme Court and the Misappropriation Theory of Securities Fraud and Insider Trading: Clarification or Confusion?*, 27 CAP. U. L. REV. 419, 421 (1999).

3. Roberta S. Karmel, *The Relationship Between Mandatory Disclosure and Prohibitions Against Insider Trading: Why a Property Rights Theory of Inside Information is Untenable*, 59 BROOK. L. REV. 149, 152-53 (1994).

upon any person, in connection with the purchase or sale of any security.⁴

Two theories of liability for insider trading have emerged from this rule: the classical theory and the misappropriation theory.⁵ The classical theory imposes liability when a traditional corporate insider trades based on nonpublic information gathered in the course of the insider's duties.⁶ The misappropriation theory extends liability to those individuals who trade based on nonpublic, material information but are not corporate insiders and owe no duty to the shareholders of the corporation.⁷ The misappropriation theory focuses on individuals who trade based on confidential information in breach of a fiduciary relationship with the source of the information.⁸ Therefore, an analysis of fiduciary duty is key to determining a violation of Rule 10b-5 under the misappropriation theory.⁹

The validity of the misappropriation theory was the subject of debate among the circuits until 1997.¹⁰ In that year, the Supreme Court resolved the circuit split in *United States v. O'Hagan*, holding the misappropriation theory was a valid basis for enforcement under Rule 10b-5.¹¹ However, the decision in *United States v. O'Hagan* failed to resolve the controversy surrounding the misappropriation theory.¹² Part I of this Note discusses the history of the

4. 17 C.F.R. § 240.10b-5 (2005).

5. See Snyder, *supra* note 2, at 421-22; Bach Hang, Note, *The SEC's Criminal Rulemaking in Rule 10b5-2: Incarceration Should be Made of Sterner Stuff*, 41 WASHBURN L.J. 629, 635-36 (2002).

6. Hang, *supra* note 5, at 635-36.

7. See *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).

8. *Id.*

9. See generally Hang, *supra* note 5, at 636 (stating to find fraud under misappropriation theory, there must be a breach of a fiduciary duty).

10. See, e.g., *United States v. O'Hagan*, 92 F.3d 612, 618 (8th Cir. 1996), *rev'd*, 521 U.S. 642 (1997) (rejecting the misappropriation theory); *United States v. Bryan*, 58 F.3d 933, 944 (4th Cir. 1995) (rejecting the misappropriation theory); *SEC v. Cherif*, 933 F.2d 403, 410 (7th Cir. 1991) (approving a variation of the misappropriation theory); *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991) (approving a variation of the misappropriation theory); *SEC v. Clark*, 915 F.2d 439, 449 (9th Cir. 1990) (approving a variation of the misappropriation theory); *Rothberg v. Rosenbloom*, 771 F.2d 818, 822-23 (3d Cir. 1985) (approving a variation of the misappropriation theory).

11. See *O'Hagan*, 521 U.S. at 652-54.

12. See Richard W. Painter, Kimberly D. Krawiec, & Cynthia A. Williams, *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153, 191 (1998) (criticizing the lack of clarity of the scope of the fiduciary duty, beyond the classic insider trading relationship, needed to

misappropriation theory prior to the *O'Hagan* decision.¹³ Part II analyzes *United States v. O'Hagan* and the questions the decision left unanswered.¹⁴ Part III examines the evolution of the interpretation of the fiduciary duty requirement.¹⁵ Part IV analyzes Rule 10b5-2 and its effect on the enforcement of insider trading using the misappropriation theory.¹⁶ Finally, Part V discusses the parity of information theory as an alternative to the fiduciary duty requirement.¹⁷

I. MISAPPROPRIATION THEORY BEFORE *O'HAGAN*

A. *Chiarella v. United States*¹⁸

The Supreme Court first discussed the misappropriation theory in dicta in *Chiarella v. United States*.¹⁹ This case involved an employee of a printing company who obtained material, nonpublic information regarding a pending tender offer while performing his job.²⁰ *Chiarella* used this information to purchase stock in the target company.²¹ The majority in *Chiarella* stated:

We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information. Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific

impose liability under the misappropriation theory); Quinn, *supra* note 1, at 889 (discussing the failure of the Supreme Court in *O'Hagan* to explain what types of relationships establish a duty under the misappropriation theory).

13. See discussion *infra* Part I.

14. See discussion *infra* Part II.

15. See discussion *infra* Part III.

16. See discussion *infra* Part IV.

17. See discussion *infra* Part V.

18. 445 U.S. 222 (1980).

19. *Id.* at 235-36.

20. *Id.* at 224.

21. *Id.*

relationship between two parties, should not be undertaken absent some explicit evidence of congressional intent.²²

In his dissent, Chief Justice Burger interpreted section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 “to mean that a person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading.”²³ This dissent stressed the word choice used in the provisions, imposing liability on “*any* person engaged in *any* fraudulent scheme.”²⁴ Chief Justice Burger stated the law should not require a fiduciary duty to the source of the information to impose liability because there will be an automatic breach of the duty owed to all investors in the market.²⁵ He endorsed a fraud-on-the-investor approach to the misappropriation theory.²⁶ This approach, also known as fraud-on-the-market, allows a court to find Rule 10b-5 liability if the trading affected the integrity of the market.²⁷ The plaintiff does not show individual reliance on a particular misrepresentation but only shows reliance on the integrity of the security’s market price.²⁸ The materiality of the information is the key factor in determining whether there was an infraction under the fraud-on-the-market theory.²⁹

After Burger’s strong dissent in *Chiarella*, the SEC began to use the misappropriation theory in its pursuit of insider trading claims but decided to use a fraud-on-the-source approach rather than the fraud-on-the-investor approach endorsed by Chief Justice Burger.³⁰ The fraud-on-the-source approach to insider trading provides “a person who has misappropriated nonpublic information has an absolute duty

22. *Id.* at 233 (footnote omitted).

23. *Id.* at 240 (Burger, C.J., dissenting).

24. *Chiarella*, 445 U.S. at 240.

25. *See id.* at 240-42.; *see also* Nelson S. Ebaugh, *Insider Trading Liability for Tipsters and Tippees: A Call for the Consistent Application of the Personal Benefit Test*, 39 TEX. J. BUS. L. 265, 274 (2003).

26. Ebaugh, *supra* note 25, at 274.

27. *See* WILLIAM K.S. WANG & MARC I. STEINBERG, *INSIDER TRADING* 216 (1996).

28. *Id.*

29. *See id.*

30. Ebaugh, *supra* note 25, at 274-75.

to disclose that information or to refrain from trading.”³¹ This approach focuses on the relationship between the tipper and tippee.³² The SEC’s basis for the decision to adopt a fraud-on-the-source approach rather than a fraud-on-the-market approach is unclear.³³

B. *United States v. Newman*³⁴

The fraud-on-the-investor application of the misappropriation theory was successful in *United States v. Newman*, which, like *Chiarella*, involved employees.³⁵ In *Newman*, investment banking firm employees learned of tender offers and mergers before anyone announced the transactions to the public, and they traded on that information.³⁶ The Second Circuit Court of Appeals found “In other areas of law, deceitful misappropriation of confidential information by a fiduciary . . . has consistently been held to be unlawful.”³⁷ The court was doubtful “Congress intended to establish a less rigorous code of conduct under the Securities Acts.”³⁸

C. *Dirks v. SEC*³⁹

After the Second Circuit’s endorsement of a broad interpretation of the Securities Acts, the Supreme Court set express limits on this extension of liability in *Dirks v. SEC*.⁴⁰ The *Dirks* case involved a tipper-tippee situation.⁴¹ An analyst received a tip from an insider that fraud was occurring within the company.⁴² The analyst did not trade on the information but did inform his clients of the

31. *Chiarella v. United States*, 445 U.S. 222, 240 (1980) (Burger, C.J., dissenting).

32. See generally Ebaugh, *supra* note 25, 267-68 (defining a tipper as “a person who discloses material, nonpublic information to another” and a tippee as “a person who trades on the basis of the information received from the tipper”).

33. *Id.* at 275.

34. 664 F.2d 12 (2d Cir. 1981).

35. See *id.* at 15-19.

36. *Id.* at 15.

37. *Id.* at 18.

38. *Id.*

39. 463 U.S. 646 (1983).

40. See *id.*

41. See *id.* at 649, 651.

42. *Id.* at 648-49.

misconduct.⁴³ Several of these clients sold their shares based on his information.⁴⁴

In *Dirks*, the Supreme Court refused to enforce the parity-of-information theory and held “Because the disclose-or-refrain duty is extraordinary, it attaches only when a party has legal obligations other than a mere duty to comply with the general antifraud proscriptions in the federal securities laws.”⁴⁵ The parity-of-information theory is the belief “all investors should have equal access to information that a reasonable investor would consider material to investment decisions, and that any trade in which only one party had an opportunity to learn and did learn such information is inherently unfair.”⁴⁶ The Court based its decision partly on the effect the parity-of-information theory would have on security and other market analysts because their jobs require them to “ferret out” information and could be viewed as crossing the line of insider trading under this broad theory of liability.⁴⁷ The issue of how to treat market analysts fairly, with regards to insider trading, is still an unsettled issue.⁴⁸ Some suggest the Court’s rejection of the parity-of-information theory in *Dirks* was the main contributing factor in “the development of the ‘misappropriation theory’ under 10b-5, which focuses on a deceptive manner of obtaining nonpublic information instead of any uniqueness of position.”⁴⁹

43. *Id.* at 649.

44. *Id.*

45. *Dirks*, 463 U.S. at 657 (quoting *Dirks v. SEC*, 681 F.2d 824, 837 (D.C. Cir. 1982), *rev’d*, 463 U.S. 646 (1983)).

46. *Dirks v. SEC*, 681 F.2d 824, 835 (D.C. Cir. 1982), *rev’d*, 463 U.S. 646 (1983).

47. See Karmel, *supra* note 3, at 156.

48. See generally J. Scott Colesanti, *Bouncing the Tightrope: The S.E.C. Attacks Selective Disclosure, but Provides Little Stability for Analysts*, 25 S. ILL. U. L.J. 1 (2000) (discussing the serious issues facing market analysts in light of new Securities and Exchange Commission regulations). With the advent of Regulation FD and increasing liability for insider trading under Rule 10b-5, market analysts are in the difficult position of performing their job well enough to be successful while not crossing the line into insider trading based on the misappropriation theory. *Id.* An analyst is successful based on the analyst’s superior knowledge of the market and securities traded on the exchange, but the traditional methods analysts utilize to obtain this information could lead to insider trading liability under the current securities rules and regulations. *Id.*

49. *Id.* at 15.

D. United States v. Bryan

In contrast to *Dirks*, the Fourth Circuit Court of Appeals in *United States v. Bryan* completely rejected the misappropriation theory as a valid theory of enforcement of insider trading liability.⁵⁰ Bryan was the director of the West Virginia Lottery, and his position allowed him to be a party to the negotiations of business contracts.⁵¹ Bryan manipulated who would receive the lottery's business, and then bought stock in those companies before notifying the public of the contract.⁵² The court held:

In the end, we, as judges, no less than anyone else, are bound by the actual prohibitions enacted by Congress. It is adherence to this fundamental limitation on our own authority that leads us to conclude that, as ignoble as Bryan's conduct was, it simply was not conduct that is prohibited by section 10(b) of the Securities Exchange Act of 1934.⁵³

The court viewed the misappropriation theory as a method of expanding liability under Rule 10b-5 beyond the scope Congress intended.⁵⁴ The court stated "the misappropriation theory transforms section 10(b) from a rule intended to govern and protect relations among market participants who are owed duties under the securities laws into a federal common law governing and protecting any and all trust relationships."⁵⁵ The court had concern about the uncertainty the misappropriation theory introduces into securities laws and the broadening of the scope of insider trading liability without legislative authority.⁵⁶

50. *United States v. Bryan*, 58 F.3d 933, 950-53 (4th Cir. 1995).

51. *Id.* at 937.

52. *See id.* at 937-39.

53. *Id.* at 959.

54. *See id.* at 950.

55. *Id.*

56. *Bryan*, 58 F.3d at 950-51.

II. *UNITED STATES V. O'HAGAN*

While the Fourth Circuit rejected the misappropriation theory as an unfounded extension of power, several circuits endorsed the theory.⁵⁷ The Supreme Court resolved this circuit split in 1997 when it decided the case of *United States v. O'Hagan*.⁵⁸

A. *The Facts*

The defendant, O'Hagan, was a partner in a law firm that represented a company planning a tender offer.⁵⁹ O'Hagan did not work on the tender offer, but became aware of it and proceeded to purchase call options and common stock of the company being acquired.⁶⁰ Once the companies announced the tender offer, O'Hagan cashed in his options and sold his stock, resulting in a profit of more than \$4.3 million.⁶¹

B. *The Decision*

In *O'Hagan*, the Supreme Court did not adopt Chief Justice Burger's version of the misappropriation theory as outlined in his dissent in *Chiarella*; instead, the Second Circuit's reasoning in *Newman* influenced the Court more.⁶² The Court limited the application of the misappropriation theory "to those who breach a recognized duty."⁶³ Restating its holding in *Chiarella*, the Court declared there was no "general duty between all participants in market transactions to forgo actions based on material, nonpublic

57. See, e.g., *United States v. O'Hagan*, 92 F.3d 612, 618 (8th Cir. 1996), *rev'd*, 521 U.S. 642 (1997) (rejecting the misappropriation theory); *United States v. Bryan*, 58 F.3d 933, 944 (4th Cir. 1995) (rejecting the misappropriation theory); *SEC v. Cherif*, 933 F.2d 403, 410 (7th Cir. 1991) (approving a variation of the misappropriation theory); *United States v. Chestman*, 947 F.2d 551, 566 (2d Cir. 1991) (approving a variation of the misappropriation theory); *SEC v. Clark*, 915 F.2d 439, 449 (9th Cir. 1990) (approving a variation of the misappropriation theory); *Rothberg v. Rosenbloom*, 771 F.2d 818, 822-23 (3d Cir. 1985) (approving a variation of the misappropriation theory).

58. *United States v. O'Hagan*, 521 U.S. 642, 665-66 (1997).

59. *Id.* at 647.

60. *Id.* at 647-48.

61. *Id.* at 648.

62. See *id.* at 653-55; see also *supra* Part I.

63. *O'Hagan*, 521 U.S. at 666.

information.”⁶⁴ Validating the fraud-on-the-source approach to the misappropriation theory, the Court held:

The misappropriation theory comports with §10(b)'s language, which requires deception “in connection with the purchase or sale of any security,” not deception of an identifiable purchaser or seller. The theory is also well tuned to an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence.⁶⁵

The Court's decision was not unanimous; Justice Thomas questioned the majority's reasoning in his dissent.⁶⁶ Justice Thomas pointed out one of the significant loopholes under the fraud-on-the-source approach to the misappropriation theory: if one informs the source he or she plans to trade on the nonpublic information, there is no breach of fiduciary duty and as a result, no liability under Rule 10b-5.⁶⁷ Justice Thomas was the first of many to point out “if it is true that trading on nonpublic information hurts the public, it is true whether or not there is any deception of the source of the information.”⁶⁸

C. *Criticism of the O'Hagan Decision*

Many have criticized the *O'Hagan* decision for requiring a fiduciary duty to impose liability and for failing to define what types of relationships create this fiduciary duty.⁶⁹ The first critique is best summarized by Theresa Gabaldon, who wrote “whatever the speaker's intent with respect to the listener, and whatever the relationship of speaker and recipient, the effect on the rest of the

64. *Id.* at 663 (quoting *Dirks v. SEC*, 463 U.S. 646, 655 (1983) (quoting *Chiarella v. United States*, 445 U.S. 222, 233 (1980))).

65. *Id.* at 658.

66. *Id.* at 680-701 (Thomas, J., concurring in part and dissenting in part).

67. *Id.* at 689.

68. *Id.* at 690.

69. See, e.g., Theresa A. Gabaldon, *Assumptions About Relationships Reflected in the Federal Securities Laws*, 17 WIS. WOMEN'S L.J. 215, 244 (2002); Painter, Krawiec, & Williams, *supra* note 12, at 191.

world (that is, persons trading at an informational *disadvantage*) is the same.”⁷⁰ Critics stressed it is the use of nonpublic information, rather than the circumstances surrounding the information’s acquisition, that is at the heart of the harm caused by insider trading.⁷¹ If the purpose of the Exchange Act is “to insure honest securities markets and thereby promote investor confidence,” as Justice Ginsberg stated in *O’Hagan*, the fraud-on-the-source approach to the misappropriation theory has failed to meet the main objective of the Act.⁷²

The fraud-on-the-source approach to the misappropriation theory, as adopted in *O’Hagan*, creates numerous loopholes when assessing liability.⁷³ Under *O’Hagan’s* version of the misappropriation theory, a person may avoid liability by: 1) obtaining consent from the information source; 2) disclosing the fact that one is going to trade on the information to the source; 3) obtaining the information by theft if one is not standing in a fiduciary relationship with the source; and 4) acquiring the information by accident or inadvertently.⁷⁴ Furthermore, friends and family have historically not been subject to fiduciary or similar duties; therefore, under *O’Hagan’s* version of the misappropriation theory, which requires a fiduciary duty to impose liability, an entire category of people who are likely to receive inside information—friends and family—escape liability.⁷⁵

It is difficult, if not impossible, to see how a theory of liability with so many loopholes can possibly advance the policy of assuring “honest securities markets and investor confidence.”⁷⁶ It is also hard to justify the disparate treatment between two people who trade on nonpublic information and create the same degree of harm on the every day investor based solely on the source of their nonpublic

70. Gabaldon, *supra* note 69, at 244.

71. See Painter, Krawiec, & Williams, *supra* note 12, at 179-81; Hang, *supra* note 5, at 642-44.

72. *O’Hagan*, 521 U.S. at 658; see Painter, Krawiec & Williams, *supra* note 12, at 179-81; Hang, *supra* note 5, at 642-44.

73. See Painter, Krawiec & Williams, *supra* note 12, at 179-81.

74. See *id.*; Joel Seligman, *A Mature Synthesis: O’Hagan Resolves “Insider” Trading’s Most Vexing Problems*, 23 DEL. J. CORP. L. 1, 22 (1998).

75. *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991); Seligman, *supra* note 74, at 23-24.

76. See James W. Morrissey, *United States v. O’Hagan: A Results-Oriented Approach to Insider Trading Cases*, 48 DEPAUL L. REV. 161, 189-90 (1998).

information.⁷⁷ Under *O'Hagan*, the concepts of market integrity and fairness are at the mercy of a technicality.⁷⁸

Some also criticize *O'Hagan* for requiring a breach of a fiduciary duty but failing to define what types of relationships create such a duty.⁷⁹ Lower courts must refer to state fiduciary or agency law or develop their own federal fiduciary law to determine breach of a fiduciary duty.⁸⁰ Neither of these options provide the investor with proper notice the investor is violating the securities law.⁸¹ Inadequate notice will result in inconsistent enforcement of a federal law, creating serious implications.⁸² In fact, the lack of clarity raises constitutional issues as to the application of the fraud-on-the-source approach in the criminal context.⁸³ The Supreme Court has stated "[d]ue process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal"⁸⁴ In addition to the constitutional concerns this ambiguity raises in the criminal context, it also creates the risk investors will shy away from the market and investing money for fear of violating the law.⁸⁵

III. THE EVOLUTION OF THE DUTY REQUIREMENT WITHIN THE MISAPPROPRIATION THEORY

A. United States v. Chestman

Because the Court in *O'Hagan* failed to address the types of relationships that create a fiduciary duty under the misappropriation

77. See *id.*

78. See *id.* at 190.

79. See Painter, Krawiec & Williams, *supra* note 12, at 176; Hang, *supra* note 5, at 652-55.

80. Painter, Krawiec & Williams, *supra* note 12, at 176.

81. See *id.* at 191 (discussing the lack of clarity as to what a fiduciary duty is outside of the classic insider trading scenario and how it fails to provide the investor with notice); Hang, *supra* note 5, at 652-55 (stating the development of what qualifies as a fiduciary duty under the misappropriation theory on a case-by-case basis by the courts fails to provide predictability and proper notice to investors).

82. See Painter, Krawiec & Williams, *supra* note 12, at 191 (stating "this lack of clarity raises concerns of constitutional proportion in the criminal context"); Hang, *supra* note 5, at 652-55 (stating the ambiguity found in the misappropriation theory creates "a vague standard of criminal liability").

83. See Painter, Krawiec & Williams, *supra* note 12, at 191; Hang, *supra* note 5, at 652-55.

84. Buckley v. Valeo, 424 U.S. 1, 77 (1976).

85. Snyder, *supra* note 2, at 443.

theory, *United States v. Chestman* remains the leading case on this issue.⁸⁶ Historically, courts have held business relationships create the requisite fiduciary duty under the fraud-on-the-source approach to the misappropriation theory.⁸⁷ The Supreme Court emphasized this rule in *Dirks* when it stated “an underwriter, accountant, lawyer, or consultant working for the corporation . . . may become fiduciaries of the shareholders.”⁸⁸ But courts have not resolved whether nonbusiness relationships, such as friendship and marriage, create the same type of duty.⁸⁹ In *Chestman*, the Second Circuit Court of Appeals provided some guidance regarding these types of relationships.⁹⁰

The court in *Chestman* was cautious in extending the misappropriation theory to new relationships.⁹¹ This case involved a stockbroker who traded on material, non-public information he obtained through a string of family members.⁹² The court began by defining what did not constitute a fiduciary relationship.⁹³ It stated “a fiduciary duty cannot be imposed unilaterally by entrusting a person with confidential information[,]” and marriage alone does not create a fiduciary relationship.⁹⁴

The court then turned to characteristics that would establish a fiduciary relationship or a “similar relationship of trust and confidence.”⁹⁵ The court turned to other securities fraud precedents and common law to make its determination.⁹⁶ It recognized certain types of relationships were inherently fiduciary, such as “attorney and

86. Quinn, *supra* note 1, at 887 n.129; see also *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991).

87. See *United States v. O'Hagan*, 521 U.S. 642 (1997) (holding an attorney liable for trading on information obtain through his firm while it was preparing a tender offer); *United States v. Carpenter*, 791 F.2d 1024, 1028 (2d Cir. 1986) (holding an employee liable for insider trading under the misappropriation theory for trading based on information he unlawfully obtained from his employer).

88. *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983).

89. See *Chestman*, 947 F.2d at 567-68.

90. See *id.* at 567-69.

91. *Id.* at 567.

92. *Id.* at 555.

93. *Id.* at 567-68.

94. *Id.*

95. *Chestman*, 947 F.2d at 568-69.

96. See *id.*

client, executor and heir, guardian and ward, principal and agent, trustee and trust beneficiary, and senior corporate official and shareholder.”⁹⁷ The court singled out two factors as requirements for a fiduciary relationship: discretionary authority and dependency.⁹⁸ The court did acknowledge the district court’s decision in *United States v. Reed*,⁹⁹ summarizing the “essential holding” of *Reed* to be “the repeated disclosure of business secrets between family members may substitute for a factual finding of dependence and influence and thereby sustain a finding of the functional equivalent of a fiduciary relationship.”¹⁰⁰ Therefore, the quality of the relationship is key when determining whether the requisite fiduciary relationship or its equivalent is present.¹⁰¹ A familial relationship is not an automatic exemption from liability under the misappropriation theory if the two family members have a history of discussing business affairs.¹⁰²

While the court in *Chestman* outlined the basic criteria necessary to determine whether a relationship creates a fiduciary duty, it did not provide the clarity necessary to apply the law consistently and fairly.¹⁰³ The adamant and lengthy dissents in the *Chestman* opinion regarding the types of relationships that create the duty required by the fraud-on-the-source approach to the misappropriation theory are evidence the issue is far from settled.¹⁰⁴ Judge Winter took issue with the majority’s narrow approach regarding relationships among family members, stating “it is inevitable that from time to time normal familial interactions will lead to the revelation of confidential corporate matters to various family members.”¹⁰⁵ Judge Winter

97. *Id.* at 568.

98. *Id.* at 569.

99. 601 F. Supp. 685 (S.D.N.Y. 1985).

100. *Chestman*, 947 F.2d at 569; *see also Reed*, 601 F. Supp. 685 (S.D.N.Y. 1985). In *Reed*, the court held a fiduciary relationship existed between a father and son because the two men had a history of sharing business confidences that extended beyond the father/son relationship. *See Reed*, 601 F. Supp. at 712-18.

101. *See Chestman*, 947 F.2d at 569; *Reed*, 601 F. Supp. at 705-06.

102. *See Chestman*, 947 F.2d at 569.

103. *See Snyder, supra* note 2, at 443 (discussing the “aggressive debate” between the majority and dissenting opinions as evidence there was still confusion as to what constituted a fiduciary duty under the misappropriation theory).

104. *See Chestman*, 947 F.2d at 571-88 (Winter, J., concurring in part and dissenting in part).

105. *Id.* at 579.

concluded the only way to impose liability on family members in these situations was to “extract[] formal, express promises of confidentiality” from these family members.¹⁰⁶

*B. United States v. Kim*¹⁰⁷

After *Chestman*, courts continued to develop case law concerning what constituted a fiduciary duty under the misappropriation theory.¹⁰⁸ In *United States v. Kim*, the Northern District of California evaluated whether the defendant violated Rule 10b-5 based on his use of information gathered from a fellow club member after signing a confidentiality agreement as a condition of membership in the club.¹⁰⁹ The court discussed the existence of a fiduciary duty under the *Chestman* requirements, stating “the primary essential characteristic of the fiduciary relation is some measure of superiority, dominance, or control.”¹¹⁰ The court also listed three factors it deemed necessary to establish the “fiduciary-like dominance” required under the misappropriation theory: “1) disparate knowledge and expertise, 2) a persuasive need to share confidential information, and 3) a legal duty to render competent aid.”¹¹¹

The court in *Kim* did not hold the trader liable for insider trading, despite a signed confidentiality agreement.¹¹² The court declared, “The agreement may memorialize a moral and ethical duty that members undertake, but it does not create a legal one.”¹¹³ The court concluded none of the required characteristics were present to establish “any measure of superiority, dominance, or control existed” between the member and the club.¹¹⁴ The court viewed the members

106. *Id.* at 580.

107. 184 F. Supp. 2d 1006 (N.D. Cal. 2002).

108. *See, e.g., id.* at 1009.

109. *Id.* at 1008-09.

110. *Id.* at 1011.

111. *Id.*

112. *Id.* at 1013, 1015.

113. *Kim*, 384 F. Supp. 2d at 1013.

114. *Id.*

as equals and found no breach of fiduciary duty under the misappropriation theory.¹¹⁵

C. SEC v. Yun¹¹⁶

In *SEC v. Yun*, the Eleventh Circuit Court of Appeals looked to *Chestman* for guidance.¹¹⁷ In *Yun*, a husband obtained material, nonpublic information through his job.¹¹⁸ He disclosed this information to his wife and informed her of its confidentiality.¹¹⁹ Later, a co-worker of the wife overheard her disclosing this information to her attorney and traded on the information.¹²⁰ The court addressed whether the wife violated a fiduciary duty under the fraud-on-the-source approach to the misappropriation theory.¹²¹

Ultimately, the court in *Yun* based its decision on the *Chestman* dissent, rather than the majority.¹²² The Court held:

[T]he *Chestman* decision too narrowly defined the circumstances in which a duty of loyalty and confidentiality is created between husband and wife. We think that the majority, by insisting on either an express agreement of confidentiality or a strictly defined fiduciary-like relationship, ignored the many instances in which a spouse has a reasonable expectation of confidentiality. In our view, a spouse who trades in breach of a reasonable and legitimate expectation of confidentiality held by the other spouse sufficiently subjects the former to insider trading liability.¹²³

The court found a history of keeping and sharing business confidences existed between the couple, and the requisite fiduciary

115. *Id.*

116. 327 F.3d 1263 (11th Cir. 2003).

117. *See id.* at 1271-73.

118. *Id.* at 1267.

119. *Id.*

120. *Id.* at 1268.

121. *Id.* at 1271-74.

122. *Yun*, 327 F.3d at 1272.

123. *Id.* at 1272-73.

duty existed under the fraud-on-the-source approach to the misappropriation theory.¹²⁴

D. Analysis

After the Supreme Court validated the fraud-on-the-source approach to the misappropriation theory, courts have attempted to clarify which types of fiduciary relationships create liability under the misappropriation theory.¹²⁵ The court in *Chestman* listed two required factors to establish a fiduciary duty under the misappropriation theory: discretionary authority and dependency.¹²⁶ The *Kim* court elaborated on these requirements and listed three additional factors necessary to establish a fiduciary relationship under the misappropriation theory: “1) disparate knowledge and expertise, 2) a persuasive need to share confidential information, and 3) a legal duty to render competent aid.”¹²⁷ Finally, in *Yun*, the court recognized the possibility marriage could create a fiduciary relationship under the misappropriation theory.¹²⁸ The SEC took note of these decisions and attempted to incorporate them into their regulations with Rule 10b5-2.¹²⁹

IV. RULE 10B5-2: THE CURRENT LAW OF THE LAND

A. The Rule

In response to the numerous pleas for clarity regarding the duty requirement under the misappropriation theory, the SEC adopted Rule 10b5-2 in August of 2000.¹³⁰ Rule 10b5-2 states:

124. *Id.* at 1273-74.

125. *See supra* Part III.A-D.

126. *United States v. Chestman*, 947 F.2d 551, 569 (2d Cir. 1991).

127. *United States v. Kim*, 184 F. Supp. 2d 1006, 1011 (N.D. Cal. 2002).

128. *See Yun*, 327 F.3d at 1273-74.

129. *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1421 (2002) (discussing the adoption of Rule 10b5-2 by the SEC).

130. *See* Morrissey, *supra* note 76, at 189-90 (discussing the difference in treatment of “the ‘duty-less’ trader and the trader bound by a fiduciary duty”); Smith, *supra* note 129, at 1421-22; Joseph J. Urgese, *United States v. O’Hagan: Rule 10b-5, the “Judicial Oak Which Has Grown From Little More Than a Legislative Acorn,” and the Antifraud Legislation of the Securities and Exchange Act of 1934*, 31

[A] "duty of trust or confidence" exists in the following circumstances, among others: (1) Whenever a person agrees to maintain information in confidence; (2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or (3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; *provided*, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.¹³¹

Rule 10b5-2 thus attempts to establish a bright line rule courts may use to determine whether the requisite fiduciary duty exists under the fraud-on-the-source approach to the misappropriation theory; however, numerous commentators feel Rule 10b5-2 falls short of this goal.¹³² In the commentary to proposed Rule 10b5-2, the SEC stated:

[T]he *Chestman* majority's approach does not fully recognize the degree to which parties to close family and personal

AKRON L. REV. 431, 447-52 (1998). For further discussion of the clarity problems surrounding the duty requirement of the misappropriation theory, see Part IV.A, entitled "The Nebulous Scope of the Misappropriation Theory." *Id.*; Hang, *supra* note 5, at 632 ("[T]he SEC should articulate, in detail, the parameters of the fiduciary duties that give rise to Rule 10b-5 liability under the Misappropriation Theory.").

131. 17 C.F.R. § 240.10b5-2(b) (2005).

132. See, e.g., Hang, *supra* note 5, at 630-33 (stating the SEC's effort was "half-hearted and half-baked" and it was "too little too late").

relationships have reasonable and legitimate expectations of confidentiality in their communications. For this reason, we believe the *Chestman* majority view does not sufficiently protect investors and the securities markets from the misappropriation and resulting misuse of inside information.¹³³

The SEC moved away from the narrowness of *Chestman* and began to extend liability for insider trading beyond fiduciary relationships to any relationship where “a person agrees to maintain information in confidence.”¹³⁴ The SEC’s goal in this broader approach to the misappropriation theory “is to protect investors and the fairness and integrity of the nation’s securities markets against improper trading on the basis of inside information.”¹³⁵ It appears the SEC changed the approach of the misappropriation theory from the fraud-on-the-source approach, which required a breach of a fiduciary duty, to the fraud-on-the-market approach originally advocated by Justice Burger in his *Chiarella* dissent.¹³⁶ Rule 10b5-2 focuses more on regulating the dissemination of information in the market with the goal being equal access to information.¹³⁷

In *Kim*, the Northern District of California analyzed its holding under Rule 10b5-2, but it did not apply Rule 10b5-2 because the alleged violation occurred before the official adoption of the rule.¹³⁸ The court found the rule “was designed to establish new law, not clarify existing law.”¹³⁹ It was skeptical of the government’s argument limiting the broader approach to the family member prong because the other two categories simply reiterate the principles stated

133. Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,602 (Dec. 28, 1999) (to be codified at 17 C.F.R. pts. 230, 240, 243, & 249).

134. Smith, *supra* note 129, at 1422; *see also* 17 C.F.R. § 240.10b5-2 (2005).

135. 64 Fed. Reg. at 72,603.

136. *See* Smith, *supra* note 129, at 1422 (stating the “animating principle” of Rule 10b5-2 is one of equal access of information to investors). Rule 10b5-2 expands the boundaries of fiduciary relationships to the point that “suggests that the misappropriation theory is not about fiduciary relationships at all.” *Id.*

137. *Id.*

138. *United States v. Kim*, 184 F. Supp. 2d 1006, 1014-15. Rule 10b5-2 was discussed publicly before the court wrote their opinion. *See id.*

139. *Id.* at 1014.

in *Chestman*.¹⁴⁰ The court declared “The language of . . . the new rule applies to family ‘or other non-business relationships.’”¹⁴¹

B. Is Rule 10b5-2 Beyond the Scope of the SEC's Authority?

The greatest criticism of Rule 10b5-2 is that the “rule is outside of the SEC’s authority under Rule 10b-5.”¹⁴² Rule 10b5-2(b)(1) goes against Supreme Court precedent established in *Chiarella* and *Dirks* because it merely requires an agreement to keep information confidential to establish liability under the misappropriation theory.¹⁴³ This is contrary to case law, which provides “a contractual agreement for confidentiality does not necessarily create a fiduciary duty.”¹⁴⁴ Case law since *O'Hagan* requires a fiduciary duty in addition to the agreement for liability to exist under the fraud-on-the-source approach.¹⁴⁵ The Supreme Court in *Chiarella* and *Dirks* refused to endorse a theory of liability based on the parity-of-information theory, which appears to be the rationale behind Rule 10b5-2.¹⁴⁶ The simple requirement of an agreement to keep information confidential is similar to assessing liability for trading based on material, nonpublic information regardless of the source.¹⁴⁷

C. Rule 10b5-2(b)(3)—the Family Prong

A second area of criticism revolves around Rule 10b5-2’s family prong.¹⁴⁸ The family presumption under Rule 10b5-2 is described as “both over- and under inclusive.”¹⁴⁹

140. *Id.* at 1014-15.

141. *Id.* at 1015.

142. Ray J. Grzebielski, *Friends, Family, Fiduciaries: Personal Relationships as a Basis for Insider Trading Violations*, 51 CATH. U. L. REV. 467, 492 (2002).

143. *Id.*

144. *Id.*

145. *Id.*

146. See *Dirks v. SEC*, 463 U.S. 646, 657-58 (1983); *Chiarella v. United States*, 445 U.S. 222, 233 (1980);

147. See Grzebielski, *supra* note 142, at 492.

148. See Gabaldon, *supra* note 69, at 238-39 (discussing the over-inclusive and under-inclusive nature of Rule 10b5-2); Grzebielski, *supra* note 142, at 488-91 (discussing whether a familial relationship can provide the basis for a Rule 10b-5 violation); Hang, *supra* note 5, at 663-64 (discussing Rule 10b5-2 and

The rule is over-inclusive because it presumes the persons it lists are always in relationships of trust and confidence.¹⁵⁰ In effect, Rule 10b5-2(3) is “creat[ing] a new legal relationship as a matter of federal law.”¹⁵¹ State law does not support the assumption a fiduciary relationship exists among friends or family.¹⁵² Moreover, states limit their application of fiduciary law to familial relationships because of a “reluctance to adjudicate disputes between family members.”¹⁵³ This is not the case under Rule 10b5-2(3); the plaintiffs in these cases will not be another family member.¹⁵⁴ Instead, they will likely be a stranger, represented by the SEC in the enforcement action, who the family member’s trades harmed.¹⁵⁵ Also, the over-inclusive nature of the rule serves to broaden the misappropriation theory’s reach, by enlarging the potentially liable insider trading group.¹⁵⁶

Some criticize the family presumption of Rule 10b5-2 because it is under-inclusive.¹⁵⁷ Rule 10b5-2(b)(3) lists the people who are subject to its limitations: “spouse[s], parent[s], child[ren], or sibling[s].”¹⁵⁸ This list is not complete by any means.¹⁵⁹ The rule fails to include stepparents, stepchildren, fiancées, or domestic partners.¹⁶⁰ The SEC acknowledged this weakness in its commentary to the proposed rule, stating “[p]aragraph (b)(3) does not reach non-traditional relationships (e.g., domestic partners) or more extended family relationships. However, paragraphs (b)(1) and (b)(2) could reach

concluding “whether federal law or state law is the source of the fiduciary duty analysis still remains unanswered”).

149. Gabaldon, *supra* note 69, at 238-39.

150. *Id.* at 238.

151. Grzebielski, *supra* note 142, at 489; see 17 C.F.R. § 240.10b5-2(3) (2005).

152. See Grzebielski, *supra* note 142, at 489.

153. *Id.* at 490.

154. See *id.* at 490-91 (indicating while Rule 10b5-2 establishes a fiduciary duty between family members, it will be an outside party that actually brings suit).

155. See *id.*

156. See Gabaldon, *supra* note 69, at 238-39.

157. *Id.*; see Hang, *supra* note 5, at 663.

158. 17 C.F.R. § 240.10b5-2(b)(3) (2005).

159. See Gabaldon, *supra* note 69, at 238; Hang, *supra* note 5, at 663.

160. *Id.*

these relationships, depending on the factual context of the relationship.”¹⁶¹

Despite these criticisms, Rule 10b5-2 is currently the law of the land.¹⁶² In a recent opinion, the Northern District of Texas relied on Rule 10b5-2 to deny a motion to dismiss in *SEC v. Kornman*.¹⁶³ Kornman was an attorney who provided estate and tax planning services.¹⁶⁴ After consulting with two companies regarding his services, he traded on information he received during those meetings.¹⁶⁵ While the companies chose not to use Kornman's services, they prepared and provided him with a memorandum of the meetings, which contained a confidentiality provision.¹⁶⁶ The court quoted Rule 10b5-2(b)(1), finding Kornman had agreed “to maintain information in confidence.”¹⁶⁷ The court denied the motion to dismiss, demonstrating the court's willingness to acknowledge and utilize this rule.¹⁶⁸

The SEC responded to the issues left open by the Supreme Court in *O'Hagan* with a rule stretching Rule 10b-5 in a manner reminiscent of Justice Burger's fraud-on-the-market approach to the misappropriation theory, stated in his *Chiarella* dissent.¹⁶⁹ The rule minimizes the duty requirement by broadening the definition of the types of relationships that create such a duty well beyond the scope of traditional fiduciary law, but it fails to close all of the loopholes left open by the *O'Hagan* decision.¹⁷⁰

United States v. Cassese provides a prime example of issues that remain after the adoption of Rule 10b5-2.¹⁷¹ While the events in *Cassese* occurred before the official adoption of Rule 10b5-2, the

161. Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,604 (Dec. 28, 1999) (to be codified at 17 C.F.R. pts. 230, 240, 243, & 249).

162. See generally 17 C.F.R. § 240.10b5-2.

163. See *SEC v. Kornman*, 391 F. Supp. 2d 477 (N.D. Tex. 2005).

164. *Id.* at 479.

165. *Id.* at 480-82.

166. *Id.* at 480-81.

167. *Id.* at 490.

168. See *id.* at 495.

169. See Grzebielski, *supra* note 142, at 491-93.

170. See *id.* at 492-93.

171. 273 F. Supp. 2d 481 (S.D.N.Y. 2003).

result would likely be the same applying the rule to the facts of that case.¹⁷² Cassese was an officer of a company engaged in acquisition negotiations with a competitor.¹⁷³ Once the competitor informed Cassese it would not be acquiring his company, but would be acquiring another company, Cassese purchased shares in the company the competitor sought to acquire.¹⁷⁴

Cassese never executed the confidentiality agreement submitted by the competitor.¹⁷⁵ There was no agreement to keep the information confidential, and there was no pattern of dealing to establish an expectation of confidentiality.¹⁷⁶ The Court held “Cassese was under no legal duty to aid [his competitor]”¹⁷⁷ While the SEC attempted to resolve the lingering issues of *O’Hagan*, it remains difficult to assess liability for insider trading in cases, such as *Cassese*, where a party receives material, non-public information outside the realm of confidentiality.¹⁷⁸

V. THE PARITY-OF-INFORMATION THEORY AS AN ALTERNATIVE TO THE FRAUD-ON-THE-SOURCE APPROACH TO THE MISAPPROPRIATION THEORY

The parity-of-information doctrine is not a new idea.¹⁷⁹ In fact, until *Chiraella*, courts often used the parity-of-information doctrine “to identify insiders subject to the abstain or disclose rule.”¹⁸⁰ The doctrine imposes liability for insider trading on anyone who has “access to any material, nonpublic information.”¹⁸¹ This doctrine rests on the integrity of the market theory, which states investors will be more confident and more likely to participate in the market if they feel confident they can trade without being at an informational

172. *See id.* at 483, 485-88.

173. *Id.* at 483.

174. *Id.* at 484.

175. *Id.* at 483.

176. *Id.* at 486.

177. *Cassese*, 273 F. Supp. 2d at 486.

178. *See, e.g., Cassese*, 273 F. Supp. 2d 481.

179. *See Ebaugh, supra* note 25, at 272-73.

180. *Id.* at 272.

181. *Id.* at 272-73.

disadvantage.¹⁸² The policy behind both of these ideas is “all investors should have equal access to information that a reasonable investor would consider material to investment decisions, and that any trade in which only one party had an opportunity to learn and did learn such information is inherently unfair.”¹⁸³ According to one analyst, the “integrity of the market theory is the key analytical distinction between state and federal securities fraud laws. Where state law focuses on the direct relationship between specific buyers and sellers of securities, federal law also addresses the general impact an individual securities fraud may have on overall investor confidence.”¹⁸⁴

There are several provisions of the Securities Exchange Act of 1934 which support a parity-of-information approach to insider trading by prohibiting any trading while in the possession of material, nonpublic information.¹⁸⁵ First, section 16(b) prohibits holders of more than 10% of any class of any security from realizing a profit from that security within a period less than six months, regardless of the existence of a fiduciary relationship.¹⁸⁶ Congress wanted to “renew investors confidence in the exchange markets by deterring profitable short swing trading by insiders.”¹⁸⁷ Second, section 9 prohibits the participation by any investor in market pools affecting the price of a security, regardless of the existence of a fiduciary duty.¹⁸⁸ Third, the 1936 amendments to the 1934 Act allowed the SEC to adopt Rule 15c1-6, which requires brokers or dealers to disclose to their customers any interest they may have in a security, regardless of the existence of a fiduciary duty.¹⁸⁹ Fourth, the 1970 amendments to the Securities Exchange Act of 1934 allowed the SEC to adopt Rule 14e-3 regarding tender offers, which prohibits trading

182. Joel Seligman, *The Reformulation of Federal Securities Law Concerning Nonpubic Information*, 73 GEO. L.J. 1083, 1115 (1985).

183. Ebaugh, *supra* note 25, at 273 (quoting *Dirks v. SEC*, 681 F.2d 824, 835 (D.C. Cir. 1982), *rev'd*, 463 U.S. 646 (1983)).

184. Seligman, *supra* note 182, at 1115.

185. *Id.* at 1110-15.

186. *Id.* at 1110-11.

187. *Id.* at 1111 (citing H.R. REP. NO. 73-1383 (1934)).

188. *Id.*

189. *Id.* at 1113-14 & n.149.

by any person in possession of material, nonpublic information relating to a tender offer, regardless of the existence of a fiduciary duty.¹⁹⁰ Finally, and most recently, Regulation FD restricts the selective disclosure of material nonpublic information by insiders, regardless of the existence of a fiduciary duty.¹⁹¹ The pattern is clear; the SEC is moving away from the fiduciary duty requirement within the field of securities regulation.¹⁹²

The rules have changed since the Supreme Court rejected the parity-of-information doctrine in *Chiarella* and *Dirks*.¹⁹³ If the Securities Exchange Act's true objective is "to insure honest securities markets and thereby promote investor confidence" as Justice Ginsberg stated in *O'Hagan*, the courts should replace the fiduciary duty requirement in the fraud-on-the-source approach to the misappropriation theory with the parity-of-information doctrine and a fraud-on-the-market approach.¹⁹⁴

CONCLUSION

While the Supreme Court adopted the fraud-on-the-source approach to the misappropriation theory in *O'Hagan*, the decision created as many questions as it answered.¹⁹⁵ As lower courts struggled with the lack of clarity in *O'Hagan*, the SEC adopted Rule 10b5-2 in an attempt to clarify what types of relationships create the duty requirement required by the fraud-on-the-source approach to the misappropriation theory.¹⁹⁶ Rule 10b5-2 broadened the scope of Rule

190. See Seligman, *supra* note 182, at 1114-15.

191. See Colesanti, *supra* note 48, at 5 (discussing Regulation FD and how it promotes the parity-of-information theory by "level[ing the] playing field"); Jerry Duggan, Note, *Regulation FD: SEC Tells Corporate Insiders to "Chill Out,"* 7 WASH. U. J.L. & POL'Y 159, 176-78 (2001) (discussing the comprehensive restrictions of Regulation FD).

192. See generally Seligman, *supra* note 182, at 1110-15 (discussing several provisions of the Securities Exchange Act of 1934 and its treatment of the fiduciary duty requirement).

193. See 17 C.F.R. § 240.10b5-2 (2005) (broadening the definition of fiduciary duty under the misappropriation theory to focus more on the exchange of material nonpublic information rather than the relationship between the parties).

194. *United States v. O'Hagan*, 521 U.S. 642, 658 (1997); see Seligman, *supra* note 182, at 1115-37 (discussing the "integrity of the market theory").

195. See *supra* Part II.

196. See *supra* Part IV.

10b-5 by imposing liability when an agreement to keep information confidential is present.¹⁹⁷ This minimal requirement eliminated the fiduciary duty requirement as it had existed since *O'Hagan*, and turned the focus of the misappropriation theory from the duty requirement to the possession and use of confidential information.¹⁹⁸ Rule 10b5-2 has resulted in an approach to insider trading more similar to the fraud-on-the-market approach to the misappropriation theory, based on the parity-of-information doctrine advocated by Justice Burger in his dissent in *Chiarella*, than the fraud-on-the-source approach advocated since *O'Hagan*.¹⁹⁹ Thus, the misappropriation theory has come full circle.²⁰⁰

Rebecca S. Smith

197. *See id.*

198. *See id.*

199. *See supra* Part V.

200. *See supra* Parts IV-V.